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Introducing an Interdisciplinary Frontier to Judging, Emotion and Emotion Work

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Introducing an Interdisciplinary Frontier to Judging, Emotion and Emotion Work

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Abstract

This special issue of *Oñati Socio-Legal Series*, titled *Judging, Emotion and Emotion Work*, is the result of presentations and discussions during an interdisciplinary workshop at the International Institute for the Sociology of Law (IISL) held in May 2018. This issue builds on the growing critique of the dispassionate ideal of judicial work, combining original theoretical insights with imaginative empirical analyses to extend the understanding of emotion in judging. Fifteen articles are presented in four themes: Theoretical, cultural and historical perspectives; Tensions of the dispassionate ideal; Social dynamics of emotion in judging; and Research methods, empirical insights and [changing] judicial practice. The international diversity of contributions recognises similarities and differences in the structure and organization of courts and the judiciary, and socio-cultural variations in emotional experience and expression.

Key words

Judging; emotion; emotion work

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Resumen

Este número de *Oñati Socio-Legal Series*, titulado *Judging, Emotion and Emotion Work*, es el resultado de las exposiciones y debates de un seminario interdisciplinar celebrado en el Instituto Internacional de Sociología Jurídica (IISJ) en mayo de 2018. El número se basa en la creciente crítica del ideal desapasionado del trabajo judicial, combinando perspectivas teóricas originales con análisis empíricos imaginativos, a fin de ampliar la comprensión de la emoción en el trabajo judicial. Se presentan quince artículos en cuatro temas: Perspectivas teóricas, culturales e históricas; Tensiones del ideal desapasionado; Dinámicas sociales de la emoción en el trabajo judicial; y Métodos de investigación, perspectivas empíricas y trabajo judicial [cambiante]. El carácter diverso e internacional de los artículos reconoce similitudes y diferencias en la estructura y organización de los juzgados y de la judicatura, y variaciones socioculturales en la experiencia y expresión de la emoción.

Palabras clave

Trabajo judicial; emoción; trabajo emocional

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1. Introduction

In Western law traditions, legal rules are understood as impersonal, and judges embody impartial legal authority. Emotions are viewed as inherently irrational, disorderly, impulsive and personal, and therefore inconsistent with the rationality necessary for the legitimate exercise of judicial authority. Whether a judge is assessing evidence, applying law, making a final decision or an interim order, or engaging with others in the courtroom, emotions should be set aside. From this perspective, outward displays of emotion or reliance on emotion in decision-making both are inconsistent with legal reasoning and the rational application of law. The “cultural script of judicial dispassion” (Maroney 2011) embedded in this tradition sharply limits an accepted role for judicial emotion. These limitations may be expressed in unwritten norms, more formally in judicial ethical codes and guidelines, in the judicial oath of office, or in legal determinations of the apprehension or appearance of judicial bias.

The workshop *Judging, Emotion and Emotion Work* held at IISL from 3-4 May 2018 brought together a remarkable mix of participants: researchers from many disciplines, nationalities, and career stages, along with judicial officers. The aim of the workshop was to better understand the nature of emotion, to critically investigate the claim that emotion is inherently inconsistent with and even detrimental to judicial work, to explore the role emotions do play in judicial work and to consider whether and how emotion can play a positive or facilitative role in judicial work.

The participants whose work is contained in this collection include a core of interdisciplinary scholars working directly on judicial emotion and emotion work, emotion scholars who have not studied judges, scholars of the judiciary who have not studied emotion, and judicial officers interested in the role of emotions in their professional work. Participants came from two globally dominant legal traditions, civil law and common law, and include contributors from eight different countries: Australia, England, Germany, Scotland, Sweden, New Zealand, Northern Ireland and the United States of America. This international diversity enables recognition of similarities and differences in the structure and organization of courts and the judiciary and socio-cultural variations in the nature of emotional experience and expression. Finally, the group is intergenerational, with senior, mid-career and early career scholars.

A key outcome of this workshop is this special issue of the *Oñati Socio-Legal Series*. Fifteen of the papers presented at the workshop have been revised and published here. The articles in this issue consider emotion in judging from varied theoretical and empirical perspectives, drawing on insights and methods from disciplines including law, sociology, psychology, neuroscience, philosophy, rhetoric, social work, history and criminology. Some articles aim to identify and understand emotion more fully, while others more directly investigate the place[s] of emotion in judicial work. Inquiry is consistently situated in the concrete emotional realities of everyday judicial work. Several articles challenge the traditional construction of emotion as a detriment to legitimate judging and propose ways to reposition emotion work as central to judicial experience and to recognise emotion itself as a positive judicial resource.

Papers are grouped into four major themes: Theoretical, cultural and historical perspectives; Tensions of the dispassionate ideal; Social dynamics of emotion in judging; and Research methods, empirical insights and [changing] judicial practice. It is important to recognise that all the articles draw on or contribute across all the themes of the workshop and this special issue.

2. Theoretical, cultural, and historical perspectives on emotion and judging

A historical perspective deepens the investigation of judging and emotion in several ways. The Western, post-Enlightenment image of emotion as the antithesis of rationality and reason is part of a long-standing cultural tradition, as is the image of

the judge as dispassionate and without emotion. Nonetheless, different historical contexts have allowed, recognised or experimented with emotion in judicial work. Just as ideas of judging change over time and across cultural contexts, so do concepts and theories of emotion.

In *A Role for Emotional Granularity in Judging*, **Maria Gendron** and **Lisa Feldman Barrett** demonstrate how research in psychology and neuroscience over the past 30 years has dispelled the oppositional framework between cognition and emotion. This research concludes that the brain is not organised by traditionally opposed faculties like reason and emotion; rather, such faculties are intertwined in the brain's architecture and functioning. Feelings are core to all conscious experience, though they are often backgrounded, and certain emotions will be more valuable than others in legal contexts. Gendron and Feldman Barrett describe the notion of "emotional granularity", or the ability to make fine distinctions between different emotions, and posit that it can enhance decision making. Rather than urging judges to minimise, ignore or disavow the role of emotion, they propose that improving judges' emotional granularity will produce better judicial decision-making.

Drawing on the tools of analytic philosophy, **Emily Kidd White** in *Replaying the Past: Roles for Emotion in Judicial Invocations of Legislative History, and Precedent* argues that service emotions, or emotions used to facilitate a practice in service of a held value, are integral to judicial reasoning in the adjudication of constitutional rights. When in a service role, emotions are implicated in legal reasoning and can play pragmatic and motivational roles. Judges draw on emotions to put themselves into a particular emotional frame for the purposes of reasoning well in light of their values. Their reasoning techniques can entail affectively-laden examples; and judicial understandings of constitutional rights are regularly sharpened by reference to past violations. Service emotions tethered to injustice, such as rue and indignation, White argues, can assist legal reasoning in cases of affronts to human dignity, but are not a panacea for the limits of formalism.

Some historical epochs or moments have explicitly experimented with combining emotion and judging. The turn of the 20th century has been of particular interest to historians due to the forceful transformation of the ideal of judicial emotion that emerged in several countries during that time. In his article *A Revolutionary Feeling of Justice? Emotion and Legal Judgement in Late Imperial and Early Soviet Russia*, **Pavel Vasilyev** argues that the free law movement in central Europe played an important role in raising the significance of judicial emotions and connecting a feeling of justice to judicial independence and discretion. He examines the implementation of the concept of "feeling of justice" – an amalgam of conscience and feeling in the administration of justice – following the 1917 Russian Revolution. This experimental model of revolutionary justice combined with socialist legal consciousness ultimately failed, Vasilyev writes, because of institutional inertia, famine and disease, and the lack of material, financial and human resources, including insufficient numbers of judges, factors that combined to defeat the emotionally-infused revolutionary ideals articulated by legal scholars of the era.

By investigating debates in jurisprudence in the German speaking countries during the early 20th century, **Sandra Schnädelbach** demonstrates how the changing socio-political landscape influenced the perception, display and uses of judicial emotion. Her article *The Voice Is the Message: Emotional Practices and Court Rhetoric in Early Twentieth Century Germany* shows that during this era the previous cultural association between emotional distance and judicial objectivity gave way to an interactional focus. Judges came to rely on rhetoric and vocal performance as emotional practices to manage their own emotions and to actively engineer the emotions of others in court. This approach hinged largely on *Rechtsgefühl* – a composite of the German words for law and emotion – and the view that good judges correctly balance reason and emotion. However, as Schnädelbach tells us, debates

about the meaning of *Rechtsgefühl* and the proper role of the judge within it ultimately thwarted its development.

3. The tensions of the dispassionate ideal

Perhaps no concept is more central to the study of judicial emotion than the ideal of judicial dispassion. The idea that a good judge should approach her work with no emotional investment or reaction whatsoever – what Maroney calls the “persistent cultural script of judicial dispassion” – is a deeply rooted, core feature of most modern systems of law (Maroney 2011). This entire special issue, and the workshop from which the papers emerged, exists in disruptive dialectic with that script, and a number of the authors take it on directly. Two accounts show that judges express (and, behind such expressions, experience) emotions and suggest that those emotions are integral to their judging. Another pair of articles explore the collision between the emotions felt and displayed by laypersons in an ostensibly dispassionate court, and the manner in which judges can smooth or exacerbate that disjuncture.

In the first category, in *Deconstructing Judicial Expressions of Disgust* **Heather Conway** and **John Stannard** unearth and analyse evidence of judicial expressions of disgust, both the ‘core’ disgust characterised by physical repulsion and the “socio-moral” disgust triggered by egregious norm violations. After exploring those two iterations of disgust and reviewing prior debates over its propriety in law, the authors describe a sample of written opinions in which they identify verbal disgust signals. While recognizing the limitations of a case law approach, Stannard and Conway conclude that the ideal of dispassion does not prevent judges from expressing both forms of disgust, particularly in criminal cases such as those involving sexual violence against children.

Cyrus Tata, in *Humanising Punishment? Mitigation and “Case-Cleansing” Prior to Sentencing*, calls our attention to a different aspect of the tension over dispassion in the criminal sentencing context. A judge’s efforts to treat the defendant as a unique individual with dignity, or what Tata calls humanisation, may be in tension with efficiency. While humanisation generally is thought to benefit defendants by enhancing feelings of inclusion and even empowerment, Tata instead focuses on its impact on legal professionals. By signalling to judges that the system is fair and their work noble, he argues, humanisation cleanses the proceedings of troubling ambiguities, providing feelings of comfort and purity (which may or may not be warranted) and thus promoting efficiency.

Turning to laypersons, in *Leaving Emotion Out: Litigants in Person and Emotion in New Zealand Civil Courts*, **Bridgette Toy-Cronin** draws on her empirical work on ‘litigants in person,’ or self-represented parties, in New Zealand. Legal emotion norms make courts feel foreign and intimidating, so that these parties may feel out of place and unable to tell their stories in a legally coherent, relevant manner. While they are aware of norms dictating that one must “leave emotion out” of court, and while some may try to comply, their capacity to do so is limited, creating confusion and reducing litigants’ sense of fairness. Judges, Toy-Cronin observes, display mixed success in handling these litigants’ emotional norm violations in a respectful manner, highlighting an area for judicial growth. Self-represented litigants are perceived by judges as inherently emotional since they are personally involved in the case. Judges deem these litigants’ emotional expression to be reflections of their character, while lawyers’ emotional expressions can be interpreted as strategic.

In *Family Violence and Judicial Empathy: Managing Personal Cross Examination in Australian Family Law Proceedings*, **Tracey Booth** examines the extent to which Australian judges dampen the potential harms of having domestic violence victims interact with abusers in court, for example, during cross-examination directly by the self-represented partner. As such encounters may be traumatic and affect the quality of evidence, judges can modify proceedings – for example, by allowing testimony via videolink and prohibiting emotionally provocative questioning. However, Booth finds

that judges' use of such mechanisms is idiosyncratic. She suggests that these practices might be more stable were judges consistently to deploy empathy, control anger, and draw on "background" emotions such as loyalty to justice principles. She thus draws a direct line between the judge's emotions and those of the lay participants.

4. The social dynamics of emotion in judging

When investigating the role of emotion in court, it has been common to focus on specific actors, such as victims, lawyers, or judges. Lately, however, scholars have begun to shift attention to the social dynamic of court interactions. Several papers in this special issue investigate interactions between multiple actors in court, particularly asking how the judge can influence the emotion experience and performance of other actors (Toy-Cronin, Booth, Roach Anleu and Mack, Leben). Three papers use interaction as a theoretical centre and deploy observation research to tease out what interactions actually "do" in court proceedings.

Stina Bergman Blix and **Åsa Wettergren** in *The Emotional Interaction of Judicial Objectivity* contest the notion of objectivity as a disembodied state, highlight the interactional aspects of judges' objectivity work and show how the maintenance of a dispassionate ideal requires skilled emotional investment. They use two theoretical constructs to explain the role of emotion in court interaction. First, their attention to judges' "background emotions" (Barbalet 2011) broadens the traditional focus on consciously-accessible emotion states to include habituated, subtle emotions, such as interest and pride. Second, by incorporating the concept of "the emotive-cognitive judicial frame" (Bergman Blix and Wettergren 2018), they urge that the ideal of dispassionate law be taken into account when investigating judicial emotion, focussing on how emotion is displayed and reciprocated in a situated frame that purports to disallow its presence.

By analysing the minute details of facial expressions, gesture and discourse in *Storytelling Rituals in Jury Deliberations*, **Meredith Rossner** uncovers the unfolding of an "interaction ritual" (Collins 2004) in jury deliberation. The jurors' initially individual and competing accounts develop into a joint focus and engagement, producing shared emotions and solidarity within the group, emotions that are necessary for arriving at a joint verdict. The ritual elements allow for and work iteratively with the collective creation of a believable story of "what happened" in the case. The combination of interaction theory and visual and audio analysis makes it possible to detect a ritual base of common-sense reasoning in decision-making. While her direct focus is on jurors, Rossner's exploration of emotional dynamics in group decision-making raises intriguing questions about the operation of such dynamics in multi-member courts, such as the appellate panels common in the United States or the panels of professional and lay judges that hear trials in Sweden.

Leslie Moran also analyses audio and visual data in *The Wit of Judge Rinder: Judges, Humour and Popular Culture*, but his focus on the reality court show *Judge Rinder* adds the possibility of investigating the impact of mediating technologies themselves. How, Moran asks, are audio and visual techniques used in representations of court proceedings to frame the participants' interaction and social relations, and in particular the social dynamics of humour in court? What do judges' humour and lay participants' laughter do? Humour, Moran shows, both amplifies and offers relief from the social hierarchies of the courtroom. In an interesting finding, he also demonstrates that camera placement allows the TV audience to both experience the judge's point of view and to evaluate the judge's performance.

5. Research methods, empirical insights and [changing] judicial practice

Increasingly, scholars are moving to integrate theory, especially about the judicial role and its governing norms, with the direct empirical study of judicial emotion and emotion work in real-life settings, and to generate research findings that are of

practical value to the judiciary. Empirical research investigating emotion in any location presents challenges, as does investigating judging. Studying the combination – emotional aspects of judging – presents particular difficulties, as it requires interrogating the experiences and behaviour of a sometimes difficult population for researchers to access, while inquiring about emotion, something regarded as having little or no legitimate role in judicial practice. The articles in this section provide examples of conceptually original, empirically valid and practically valuable research. Collectively, they confirm that emotion may be perceived by the judiciary as an impediment to fair and neutral performance of their role, but they also identify many ways that judges themselves understand that emotion, properly managed and displayed, can and should become a resource for good judging.

In *Empirically Investigating Judicial Emotion*, **Terry Maroney** systematically addresses the current state of empirical research into judging and emotion and suggests directions and methods for future research. After carefully defining both judicial emotion and empirical research, she generates a taxonomy of different research approaches to guide the field's disciplined development. Next, she undertakes a detailed review of extant research projects investigating judging and emotion, focusing – first – on how their approaches fit within the taxonomy, and – second – on what methods they deploy, considering the challenges, advantages, and disadvantages of each. While much important work has been done, Maroney characterizes the field of empirical study of judicial emotion as containing “wide-open spaces” for more exploration.

In *A Sociological Perspective on Emotion Work and Judging* **Sharyn Roach Anleu** and **Kathy Mack** undertake a detailed sociological analysis of a single extract from an interview with an Australian judicial officer, drawn from a larger multi-year project (Roach Anleu and Mack 2017), as a vehicle to articulate the many ways that emotion and emotion work are part of judicial work. Emotion requires management, even suppression, and is also used consciously or proactively as a resource to achieve normative and practical goals. The concept of and commitment to impartiality provides an anchor and a tool for emotion management, shaping, but not entirely determining, the boundaries of judging, emotion and emotion work. They conclude by suggesting emotion work as central to judicial performance.

In *Exploring the Overlap between Procedural-Justice Principles and Emotion Regulation in the Courtroom*, **Steve Leben** provides a vivid example of the value of academic research for judicial practice. He explores and connects two significant theoretical and empirical literatures: procedural-justice principles and emotion regulation. He identifies areas of overlap between these concepts and argues that procedural justice principles, commonly embraced by judges in the USA, also promote and depend on judicial emotion regulation. The perceived fairness of the court process may require avoiding certain judicial emotions and their display, such as anger, but perceptions of fairness also allow or demand some emotions – for example, empathy – and associated displays when they demonstrate a judge's sincerity. Both conceptual perspectives, Leben argues, support the conclusion that judges should pay more attention to their own emotions.

In *Judicial Perspectives on Emotion, Emotion Management, and Judicial Excellence in the USA*, **Jennifer Elek** introduces the intensive empirical research and practical directions generated by the US National Center for State Courts Judicial Excellence Project. The Project undertook interviews, focus groups and surveys to identify what judicial excellence means to judges. Findings reveal that judicial excellence incorporates a wide range of judicial capacities and behaviours, including considerable attention to their own emotions and those of others; that excellence requires skill in emotion management, of self and others; and that emotion can be a tool for effective judicial work. These insights have been incorporated into a framework to inform and support judicial professional development.

6. Concluding remarks

The workshop itself and the articles produced from it have generated a broad socio-legal examination of emotion[s] and emotion work in judging from diverse disciplinary, conceptual, empirical and jurisdictional perspectives. These articles bring together examinations of the nature of emotion itself; subjective judicial emotional experience, self-perception and management; judicial emotion work in courtroom interaction; emotion in judicial decision-making, including interpreting the emotion of others; and cultural variation in emotion scripts, together generating possible ways of repositioning emotion as a positive judicial resource.

This workshop was positioned against a backdrop in which even those scholars who perceive the importance of understanding or reconstructing judging in order to more accurately account for emotion might be inclined to assume that emotion remains in tension with conventional claims to judicial impartiality and legitimacy. One insight from this workshop is the importance of identifying the extent to which this legal suspicion of emotion in judging reflects ignorance about the nature of emotion. That suspicion takes emotion to be largely reactive, spontaneous, and physical, and it imports that assumption into its baseline assessment of how emotion is experienced and expressed by judges and others in the courtroom. A more up to date and nuanced conception of emotion, in contrast, entails complicating our understanding of the core qualities of judging, such as impartiality, objectivity, and fairness, in relation to emotion, its management and display.

In looking to promote future research in this field, the meeting crossed disciplinary boundaries, modeling the inherent interdisciplinarity of research on emotion and judging and championing the value (and challenge) of interdisciplinary dialogue. Another challenge we collectively identified is the practical difficulty of detecting, gathering data on, and coding emotions. This difficulty is magnified by disciplinary differences in how to define and identify emotions, as well as by the methodological challenges of investigating often backgrounded emotions with low or ambiguous physical visibility. Both these points highlight the importance of thinking carefully about the questions we are asking and the methods best suited to answering them, and of situating the analysis of emotion and judging within a cultural and structural context.

Lastly, the mix of scholars and judges at the workshop and as authors in in this special issue raised the importance of communication between researchers and practitioners. Such dialogue enables us to learn from one another, to “give back to the field” by presenting and writing publications for judicial audiences, and to use the growing interest from judges to enable future research to incorporate evolving judicial practice.

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